State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING
SUMMARY DECISION
OAL DKT. NO. ADC 12167-09
AGENCY DKT. NO. SADC ID# 1120

MARIE BAILEY,
Petitioner,
v.
HUNTERDON COUNTY AGRICULTURE DEVELOPMENT BOARD AND DUBROW'S NURSERIES,
Respondents.

Marie Bailey, for petitioner, pro se

Aaron R. Culton, Esq., for Hunterdon County Agriculture Development Board, respondent

William J. Caldwell, Esq., for DuBrow's Nurseries, respondent (Carter, Van Rensselaer & Caldwell, attorneys)

Record Closed: April 17, 2013 Decided: May 13, 2013

BEFORE **EDWARD J. DELANOY, JR**., ALJ:

STATEMENT OF THE CASE

This matter arises from a Right to Farm Act complaint filed against respondent DuBrow's Nurseries (hereinafter DuBrow's) by petitioner Marie Bailey (hereinafter Bailey). As relevant background, DuBrow's, which operates a nursery business in Franklin Township, Hunterdon County, was the subject of prior zoning litigation involving Bailey and her husband, who live on the property adjacent to DuBrow's. DuBrow's sells, plants, and maintains nursery stock, such as trees and shrubs, and as part of its nursery business, provides landscaping and lawn maintenance services to the customers who buy nursery stock.

PROCEDURAL HISTORY

On September 9, 2009, Bailey filed with the State Agricultural Development Committee (hereinafter SADC) an appeal of the Hunterdon County Agriculture Development Board's (hereinafter HCADB) September 2, 2009, decision to administratively dismiss Bailey's dispute application of August 10, 2009. The SADC transmitted the matter to the Office of Administrative Law where it was filed on December 11, 2009, as a contested case. On March 14, 2013, Bailey filed a motion for summary decision requesting a finding that the HCADB acted in a capricious, arbitrary and unreasonable manner, and remanding the matter to the HCADB pursuant to the Right to Farm rules and regulations. On April 17, 2013, the HCADB filed a motion for summary decision requesting a finding that the HCADB properly dismissed Bailey's application for a hearing under the Right to Farm Act. On April 17, 2013, DuBrow's also filed a brief requesting Bailey's appeal be dismissed. On April 17, 2013, the record closed.

FACTUAL DISCUSSION

The facts herein are not in dispute, and accordingly, I **FIND** the following **FACTS**: In 1996, Bailey and her husband complained to the Franklin Township zoning officer that DuBrow's activities were not permitted uses under the municipal zoning ordinance. In response, DuBrow's sought an interpretation of the zoning ordinance from the

Franklin Township Board of Adjustment (hereinafter Franklin Township) regarding its activities. As part of that matter, Franklin Township passed resolutions finding that DuBrow's activities, including the temporary storage of balled and burlapped trees and shrubs that were grown off-site, the use of the property to conduct an off-site landscaping/lawn maintenance business, and the on-site maintenance and repair of equipment used in the landscaping business, were permitted agricultural or horticulture uses in the zone in which DuBrow's is located.

Bailey and her husband appealed Franklin Township's resolutions to the Superior Court, Hunterdon County, Law Division, which held that Franklin Township's decisions with respect to the on-site tree and shrub storage for eventual installation on customers' properties and the on-site maintenance and repair of equipment used in off-site landscaping operations were reasonable interpretations of the municipal zoning ordinance, but overturned Franklin Township's finding that the use of the property to conduct an off-site lawn maintenance business was a permitted use under the zoning ordinance. The Appellate Division affirmed.

In 1998, DuBrow's applied for and was granted by Franklin Township a variance to conduct its off-site lawn maintenance business as an adjunct to its overall operation. The Law Division reversed. However, on appeal, the Appellate Division reversed the lower court and held that Franklin Township's decision was not arbitrary and capricious.[1]

On August 10, 2009, as part of the current matter, Bailey filed with the HCADB a complaint under the Right to Farm Act against DuBrow's. According to the complaint, "[i]f the CADB has jurisdiction, it is requested that a decision be rendered as to whether a landscaping operation, that relies on purchased stock and is operated on property located in an agriculture/residential zone, is entitled to the protection under the Right to Farm Act – N.J.S.A. 4:1C-1 through 10.4 and N.J.A.C. 2:76-1 through 2.1 et. seq."

[1] In yet another matter, the Baileys filed a petition with the Board of Taxation of Hunterdon County in 2004 alleging that DuBrow's was not entitled to farmland assessment. The Board of Taxation upheld the assessment. On appeal, the Tax Court found that the property was properly assessed as farmland, but that two buildings on the property, and the land under the buildings, were not actively devoted to agriculture and not entitled to farmland assessment. The Appellate Division affirmed. See Bailey v. Franklin Twp., Dkt. No. A-6732-04 (App. Div. January 19, 2007).

By resolution on October 9, 2009, the HCADB dismissed Bailey's complaint "for failure to specify a claim upon which relief can be granted." According to the resolution, which noted the prior zoning litigation and various holdings of Franklin Township, the Law Division, and the Appellate Division:

> Counsel for the CADB, after having reviewed the application and procedural history, determined the complaint did not set forth any specific activity of the farmer which the applicant contended was inappropriate or of concern. The application did not set forth any new activity which had not already been addressed and adjudicated by the Court and Franklin Township. Therefore, the application was administratively dismissed. On September 2, 2009, County Counsel, on behalf of the CADB sent a letter to the applicant informing her of this determination.
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> At its September 10, 2009 meeting, the CADB upheld the administrative dismissal and determined that no further action was needed to be taken by the Board, since there was no specific activity of the farmer set forth in the complaint which required an assertion of jurisdiction by the CADB.

LEGAL ANALYSIS

N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. An adverse party does not bear an obligation to oppose the motion, but to survive summary decision, there must be "a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The non-existence of one entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. "Applying this standard, the ALJ must

determine whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." 1106 Ocean Ave. v. Governing Body of Point Pleasant Beach, ABC 4355-02, initial decision, (October 25, 2004) (citing Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 122 (App. Div. 1995)). I am therefore required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Brill, supra, 142 N.J. at 539-40. Like the New Jersey Supreme Court's standard for summary judgment, the language for summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

The Right to Farm Act, N.J.S.A. 4:1C-1 to -10.4 (RTFA), and the regulations promulgated thereunder, N.J.A.C. 2:76-2.1 to -2B.3, declare that "[i]t is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey." N.J.S.A. 4:1C-2(e). The RTFA "renders its provisions preeminent to 'any municipal or county ordinance, resolution, or regulation to the contrary'" and its "provisions [are] preeminent over a municipality under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -112." Bor. of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 347 (App. Div. 2004), certif. denied, 179 N.J. 372 (2004) (citing N.J.S.A. 4:1C-9; Twp. of Franklin v. Den Hollander, 172 N.J. 147 (2002)). Under the RTFA, "[a]ny person aggrieved by the operation of a commercial farm shall file a complaint with the applicable county agriculture development board [CADB] or the State Agriculture Development Committee [SADC] in counties where no county board exists prior to filing an action in court." N.J.S.A. 4:1C-10.1(a); N.J.A.C. 2:76-2.10(a). Thus, "the Legislature directed that private nuisance claims should be addressed, at least initially, in the administrative forum." Curzi v. Raub, 415 N.J. Super. 1, 15 (App. Div. 2010). Upon the filing of a proper complaint, the CADB or SADC will then

determine whether the activity in dispute is protected by the RTFA. N.J.S.A. 4:1C-10.1(a); N.J.A.C. 2:76-2.10(a).

The HCADB properly dismissed Bailey's application for a hearing because her application did not set forth any facts or information that would require the HCADB to hear her complaint under the RTFA. In a prior, yet very similar, RTFA matter involving Bailey, the SADC upheld the HCADB's decision to dismiss Bailey's complaint for a failure to show her right to hearing. See State Agriculture Development Committee Resolution #FY07R2(23) (February 22, 2007). In that matter, Rutgers Tree Growers (hereinafter RTG) applied to the HCADB for a site specific management practice recommendation (hereinafter SSAMP) for a retail farm market it sought to construct for the sale of plants, trees, and bushes because RTG anticipated that the municipality would not approve the market. The CADB did not hold a hearing or issue an SSAMP recommendation because RTG and the municipality reached an agreement on the market. However, Bailey filed a complaint under N.J.S.A. 4:1C-10.1 with the HCADB in which she "requested the CADB to conduct a public hearing 'for a decision as to whether Rutgers Tree Growers, LLL (sic) proposal for a "Retail Farm Market" is a "Site Specific Management Practice" in accordance with the Right to Farm Act . . .' The CADB denied Bailey's request for a hearing and the SADC upheld that decision. According to the SADC,

> [t]he Right to Farm Act protects qualified commercial farm operations against nuisance complaints and unreasonable municipal regulation . . . [T]he Baileys have not stated any claims against RTG in their request for a hearing that identify a nuisance . . . [T]he SADC finds that the Baileys have not stated any claims against [RTG] that entitle them to a hearing under the Right to Farm Act . . . [A]lthough the Right to Farm Act requires persons aggrieved by commercial farm operations to file an action with the appropriate CADB prior to filing an action in court, N.J.S.A. 4:1C-10.1, the Act, when read in its entirety, limits such actions to nuisance complaints and allegations by local government entities of violations of local ordinances, resolutions or regulations.

For the same reasons here, the HCADB's motion for summary decision should be **GRANTED**. I **CONCLUDE** that the HCADB properly denied Bailey's request for a

hearing because she did not allege in her complaint a nuisance, violation of a local ordinance, or any other facts that would necessitate the HCADB to exercise its jurisdiction under the RTFA. Bailey stated in her complaint that "[i]f the CADB has jurisdiction, it is requested that a decision be rendered as to whether a landscaping operation, that relies on purchased stock and is operated on property located in an agriculture/residential zone, is entitled to the protection under the Right to Farm Act – N.J.S.A. 4:1C-1 through 10.4 and N.J.A.C. 2:76-1 through 2.1 et. seq." However, through prior administrative and judicial proceedings, DuBrow's has been authorized to conduct the activities that are the subject of Bailey's current complaint. Since she has not alleged any nuisance or violation of local land use law, there is no reason for HCADB to exercise its jurisdiction to determine if DuBrow's activities are protected by the RTFA. While private nuisance claims involving farms must first be heard by a CADB or the SADC and the RTFA may preempt local land use law, in this case, there is no claim over which the HCADB should have exercised jurisdiction and there is no local ordinance for the RTFA to preempt.

CONCLUSION

Based on the foregoing, Bailey's motion for summary decision is **DENIED**, while the motion of HCADB for summary decision is **GRANTED**.

ORDER

I **ORDER** that the HCADB's motion for summary decision be **GRANTED**.

I hereby **FILE** my initial decision with the **STATE AGRICULTURE DEVELOPMENT COMMITTEE** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE AGRICULTURE DEVELOPMENT COMMITTEE**, which by law is authorized to make a final decision in this matter. If the State Agriculture Development Committee does not adopt, modify or reject this decision within forty-five days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE STATE AGRICULTURE DEVELOPMENT COMMITTEE, Health/Agriculture Building, PO Box 330, Trenton, New Jersey 08625-0330**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Edward J. Delanoy Jr.

May 13, 2013
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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